IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 5TH DECEMBER 2006 / 14TH AGRAHAYANA 1928

WP(C).No. 32305 of 2006(U)

AGAINST THE ORDER DATED 30/11/2005 IN
OS.58/2005 of MUNSIFF COURT, ETTUMANOOR

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PETITIONER:

T.S. RAMESAN, S/O.BAHULEYAN,
UMBAKKATTU HOUSE, ARPOOKARA VILLAGE,
KOTTAYAM TALUK.

BY ADV. SRI.A.K.HARIDAS

RESPONDENT:

RADHA @ SWARNAMMA,
D/O.BHASKARAN, KUDAKAPARAMBIL HOUSE,
ARPOOKARA VILLAGE, KOTTAYAM TALUK.

BY

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 05/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

W.P.(C)NO.32305 OF 2006

DATED THIS THE 5th DAY OF DECEMBER, 2006

JUDGMENT

Petitioner is the judgment debtor. Respondent is the decree holder. AS per Ext.P1 judgment in O.S.58/05, respondent is entitled to realise Rs.27,000/- with interest and cost from petitioner. Petitioner filed A.S.176/06 challenging Ext.P1 judgment with an application to condone the delay in filing the appeal under Section 5 of Limitation Act.

2. The case of petitioner was that because of the delay, petitioner cannot get an order of stay of execution from the appellate Court and meanwhile, executing Court is proceeding with the execution and therefore, petitioner has filed an application for stay before the executing Court and stay was not granted. This petition is filed under Article 227 of Constitution of India for a direction to Munsiff to issue a certified copy of

the order dismissing the application for stay and a direction to quash the order of executing court dated, 26.10.06.

3. Order XXI Rule 26 of Code of Civil Procedure enables the executing Court to grand an order of stay in proper case. The decree is for money. Even under Order XLI Rule 5 of Code of Civil Procedure, petitioner is not entitled to get an order of stay without furnishing sufficient security for the amount. By approaching the executing court under Rule 26, petitioner is not entitled to circumvent the provision and seek an order of stay. The fact that an appeal is filed by itself, is not a ground to get an order of stay as provided under Sub Rule 3 of Rule 5 of Order XLI of Code of Civil Procedure, an order of stay of execution by the appellate Court under Sub rule 1 of Rule 5 or by the Court which passed a decree under Sub Rule(2)of rule 5 is subject to the provisions of rule 3. Under rule 3 unless the court making the order is satisfied that substantial loss may result to the party applying for stay of

execution unless the order of stay is granted and the application has been made without unreasonable delay and security has been given by the applicant for the due performance of the decree, no order of stay can be granted. Therefore because of the pendency of the appeal, filed after the period of limitation, petitioner is not entitled to seek an order of stay as of right from the executing Court, though executing Court may grant an order of stay in a proper case. Exercising the extraordinary jurisdiction of this Court under Article 227 of Constitution of India, I do not find that petitioner is to be granted an order of stay as sought for. Executing Court is directed to furnish the certified copy of the order passed in the application for stay moved by petitioner, if he has applied for the same without further delay.

Petition disposed.

M.SASIDHARAN NAMBIAR,JUDGE

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